

Special Accounts – Indirect Rates

Proposal:

Request Special Account Senior Management Committee's (SASMC) approval for an OGC opinion on whether the Agency can access special accounts for the Agency's indirect costs similar to funds-in interagency agreements (IAs) where the Agency is able to charge indirect costs to the IA?

Background:

- The Agency bills its indirect rate to funds-in Interagency Agreements (IAs). Those indirect costs are then charged to the IA as a percentage of direct costs/expenditures, resulting in funds being made available for the support offices (i.e. Regions, OARM, and OCFO) that comprise the indirect cost rate.^{1,2}
- EPA's indirect costs are typically collected as part of CERCLA settlement agreements.
 - Oversight billings include EPA's direct and indirect costs, which may all be placed in a special account for future response work at a site.
 - Recoveries for past costs also typically include EPA's indirect costs in addition to EPA's direct costs for site response work.
 - Similar to recoveries for past costs, cashouts may include indirect costs in addition to EPA's direct costs to site response work.
- Special accounts are generally used to support only direct costs, such as payroll, contract, and grant expenditures for site response work.
- Model agreement language includes provision(s) to collecting indirect costs. A few examples are included:
 - "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports, and other deliverables submitted pursuant to this Consent Decree, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs...
 - "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through [insert the date of the most recent cost update], plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date.
 - Settling Defendants shall reimburse the United States under Section "X" (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States regarding obtaining compliance with such agreement, including, but not limited to, the cost of attorney time.

Current OGC Opinion on Retaining and Using Funds in Special Accounts:

EX-15 - Attorney-Client Privilege

[REDACTED]

Legal Analysis Required:

- CERCLA 122(b)(3) states, "If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement."
 - **Exemption 5 - Deliberative Process**

¹Please see: <http://intranet.epa.gov/ocfo/policies/direct/2540-12.pdf> and

² http://intranet.epa.gov/ocfo/policies/direct/2540-13-p1_agency_indirect.pdf

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- Exemption 5 - Deliberative Process

Benefits of Charging Indirect Cost Rates to Special Accounts:

Exemption 5 - Deliberative Process

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Potential Issues with Charging Indirect Cost Rates to Special Accounts:

Exemption 5 - Deliberative Process

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³ http://intranet.epa.gov/ocfo/policies/direct/2540-13_cost_acctg_standard.pdf ;
http://intranet.epa.gov/ocfo/policies/direct/2540-13-p1_agency_indirect.pdf ; and
http://intranet.epa.gov/ocfo/policies/direct/2540-13-t1_tech_interpretation.pdf

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